

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR, et
al.,

Plaintiffs,

vs.

JEFFREY DERDERIAN, et al.,

Defendants.

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U.S. DISTRICT COURT
DISTRICT OF RHODE ISLAND

Case No. 04-CV-312

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTICULARIZED NEED DISCOVERY BY
LEGGETT & PLATT, INCORPORATED AND L&P FINANCIAL SERVICES CO.**

Defendants Leggett & Platt, Incorporated and L&P Financial Services (collectively "L&P"), provide the following memorandum in opposition to Plaintiffs' motion.

Plaintiffs assert the State of Rhode Island and/or Town of West Warwick defendants (collectively "State Defendants") possess foam removed from the basement of The Station nightclub, portions of which have already been destructively tested in conjunction with the criminal proceeding. See Plaintiffs' Memorandum in Support, p.1. Plaintiffs request production of "a one square foot section of foam from 1) each sheet of foam or portion thereof still in existence and in the possession of the State of Rhode Island and/or Town of West Warwick and 2) any control samples of foam retained by the State of Rhode Island from the foam samples provided to its expert, Joseph Zicherman for testing." Id. Plaintiffs further request such foam be deposited into the Cranston evidence warehouse. Id. Plaintiffs' motion, however, appears to contemplate all such foam be preserved for their exclusive use as the

affidavit of Carl Duncan indicates the entire amount Plaintiffs request would be needed for the tests Plaintiffs envision conducting. Given this litigation's early stage, Plaintiffs' motion is premature. Instead, L&P requests the Court order the State Defendants to preserve *all* foam in their possession until further critical information concerning this foam is known.

This complex action is in its preliminary stages. No discovery has been conducted and discussions as to the manner in which discovery should proceed are just beginning. Notwithstanding, Plaintiffs' motion thrusts to the forefront for immediate resolution the important discovery issue of what is to be done with the relatively small amount of foam allegedly obtained from The Station nightclub. Such is entirely unwarranted and Plaintiffs offer no sufficient justification for sequestering only a portion of such foam for their exclusive use.

In addition to the present motion, Plaintiffs filed a declaratory judgment action in Rhode Island Superior Court seeking a Temporary Restraining Order (TRO) preventing the State Defendants from "dissipating, destroying, testing or otherwise disposing of or transferring to any party *any* polyurethane foam seized from the site of The Station Nightclub Fire until further order of this Court." See Exhibit B to Plaintiffs' motion (emphasis added). As a preliminary matter, Plaintiffs' motion here is in direct conflict with the TRO they concurrently seek from the Superior Court. Should Plaintiffs' request for a TRO and Plaintiffs' motion both be granted, the State Defendants would be subject to directly conflicting court orders - the TRO would require them to preserve all foam while this Court's order would require the production of a portion of that same foam. Regardless, the existence of Plaintiffs' request for a TRO preserving *all* the foam highlights the fact Plaintiffs' conflicting motion in this case is

premature. There is simply no need for this Court to order the specific production Plaintiffs' motion seeks. Nor have Plaintiffs demonstrated any reason why the foam they seek to sequester should be exclusively put to whatever use plaintiffs see fit.

The fundamental problem with Plaintiffs' request is that the foam at issue is a finite and exhaustible resource of substantial importance to this litigation. No party, including Plaintiffs or the State Defendants, should be permitted to unilaterally determine to what use, if any, such foam is most reasonably put. Compounding this problem is the fact L&P has little or no information concerning the foam in question¹ or the State Defendant's intentions with respect to this foam. Plaintiffs represent the State Defendants intend to perform additional destructive testing. The State Defendants, in their Objection to Plaintiffs' motion, represent no such testing is currently planned, but later indicate no such testing is planned prior to the January 21 hearing in the criminal matter. This confusion regarding whether such testing will even take place certainly highlights the need for additional discussion regarding the remaining foam and the use to which it will be put prior to ruling on plaintiffs' pending motion.

The efficacy and fairness of Plaintiffs' request for production cannot be reasonably analyzed. Nor can the competing interests inherent in this issue be knowledgeably balanced. Plaintiffs set forth no compelling reason why they should be entitled, in this vacuum of information, to the amount of foam they request. It is simply impossible to determine the appropriate allocation of the limited amount of foam allegedly in possession of the State

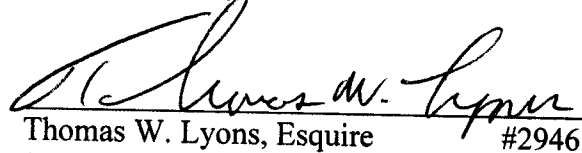
¹ For example: 1) the amount of foam taken from The Station nightclub; 2) the condition of the foam; 3) the physical makeup (i.e., number of discrete pieces, etc.) of the foam; 4) what testing the numerous parties to this matter may reasonably be entitled to perform; and 5) how much of the foam would be required for any such testing.

Defendants at this time. Once all parties acquire additional information, informed motions can be brought to resolve these issues. If this Court considers plaintiffs' motion at this time, however, L&P requests the same amount and type of foam be produced to L&P and stored in the warehouse for its own testing purposes.²

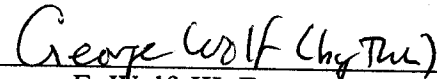
Consistent with their request for a TRO in the state court action to preserve all the foam in the State Defendants' possession, Plaintiffs' motion in this action demonstrates only a need to preserve the foam, not a need to determine how much should be preserved or how, if at all, it should be allocated or tested. Issues as to what testing is warranted, who should conduct such testing, and under what protocols or circumstances such testing should be done need not, and cannot, be resolved at this time. As such, Plaintiffs' motion should be denied as premature. Instead, L&P respectfully requests the Court order the State of Rhode Island and Town of West Warwick to preserve all foam in their possession until the necessary critical information concerning this foam can be gathered and informed evaluations can be made as to the appropriate disposition of the foam.

² As the Court is aware, the foam defendants, including L&P, have filed motions to dismiss which, if granted, would eliminate L&P's need for the requested foam.

DEFENDANTS
LEGGETT & PLATT INCORPORATED and
L&P FINANCIAL SERVICES CO.
By their attorneys,



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CERTIFICATION

I hereby certify that on this 19th day of January, 2005, a copy of the within was sent to all counsel of record by email.

